SOME NECESSARY AMENDMENTS OF THE NEGOTIABLE INSTRUMENTS LAW.[1]

IT is not intended in this article to suggest all the amendments which might be made for the improvement of the Negotiable Instruments Law or for the correction of mistakes in the act, but only to discuss such changes as seem to be most necessary.

First. The question whether an instrument payable in "currency" or in "current funds" is payable in money has given rise to much conflict of authority. On one side are the cases which construe the words "currency" or "current funds" to mean legal tender or such currency as, although not legal tender, yet circulates actually and lawfully at par with coin, and therefore to make the instrument payable in money. On the other side are cases in which it is held that any currency or current funds may be tendered in payment whether at par or not, and that the instrument is therefore not payable in money.[2] If the former construction is put upon the words "currency" or "current funds," no objection can be made to regarding the instrument as payable in money, for the amount to be paid is certain. The Negotiable Instruments Law leaves the question unsolved, for in section 6–5 it is simply provided that the validity and negotiable character of an instrument is not affected by the fact that it "designates a particular kind of current money in which payment is to be made." What is meant by "current money"? or rather what is meant by "money"? Does it include not only gold and silver coin but also bank notes, treasury notes and gold and silver certificates? All of them are current and are popularly spoken of as money, but they are not all legal tender.

It has been suggested that the last paragraph of section 6–5

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[1] Because of the great diversity in the sectional numbering of the act as adopted in the different states, it has been thought best to use in this article the numbers as they appear in the act as recommended by the Commissioners on Uniform Laws. The corresponding sections of the act in the various states can be found in the Table in Brannan's Negotiable Instruments Law, p. xxii.

[2] For a fuller exposition of these differences, see an article in 24 Banking Law Journal, 177.

might be amended so as to read, ". . . is payable in currency or current funds or designates a particular kind of current money in which payment is to be made." This amendment will make an instrument having the other required formal requisites and payable in currency or current funds negotiable in the states in which the Negotiable Instruments Law is adopted. But it is submitted that such an instrument may not have a uniform value in all such states. For the question still remains what is meant by "currency" or "current funds," and here the courts will decide as they have done in the past. Indeed the Supreme Court of Iowa [3] since the adoption of the Negotiable Instruments Law has held, although without referring to the act, that a check payable "in current funds" is not negotiable. The court followed former decisions based on the interpretation of the words "current funds" as including any currency although it might not be at par with coin.

In order to make instruments payable in "currency" or "current funds" not only negotiable but of uniform value, the words in question ought to receive the same interpretation everywhere. This can be done by making section 6–5 read as follows:

"(5) Is payable in currency or current funds or designates a particular kind of current money in which payment is to be made. The words 'currency,' 'current money,' or 'current funds' shall mean such circulating media as are legal tender or are lawfully and actually circulating at par with legal tender at the time and place of payment."

Second. Section 29 [4] should be amended by substituting the words "one who is in other respects a holder in due course" for the words "a holder for value," so that the section will read as follows:

"Section 29. An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to *one who is in other respects a holder in due course*, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party."

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[3] Dille *v.* White, 132 Ia. 327, 109 N. W. 909 (1906).

[4] Section 29. An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.

It is well settled, and rightly so, that knowledge of the fact that a party to a negotiable instrument has signed it for the accommodation of another is no defense as against one to whom it has been negotiated for value before maturity, for by such negotiation the very object of the signing has been accomplished. When the accommodating party signed the instrument his purpose was to lend the use of his name to enable the accommodated party to obtain money, goods, or credit, and when that has been done by the negotiation of the instrument, it would not only be unjust but wholly contrary to the intention of the parties to permit the accommodating party to defend on the ground of no consideration as between himself and the party to whom he lent the use of his name.

It is also settled that when an accommodation instrument has been paid at maturity by the accommodated party, it cannot be again negotiated after maturity even to a purchaser for value without knowledge of its accommodation character so as to hold the accommodating party, although there is an English case which implies the contrary, provided a new stamp is put upon the instrument to satisfy the requirements of the English Stamp Act.[5] But, when the first negotiation of an accommodation instrument takes place after maturity, a different question arises upon which there is a conflict of authority in this country, some jurisdictions following the English cases which make no difference between a first negotiation after maturity and a first negotiation before maturity as regards the liability of the accommodating party, while other American courts repudiate the English cases as not in accord with mercantile understanding.

Two of the judges in the last[6] of the three cases which established the English rule decided the case only on the authority of the two earlier cases[7] and expressed doubt of the correctness of the rule. In this country the earliest cases followed the English courts with little or no consideration.[8] These cases were subsequently overruled.[9] But in the meantime, some other American

[5] Lazarus *v.* Cowie, 3 Q. B. 459 (1842).

[6] Sturtevant *v.* Ford, 4 M. & G. 101 (1842).

[7] Charles *v.* Marsden, 1 Taunt. 224 (1808); Stein *v.* Yglesias, 3 Dowl. P. C. 252 (1834).

[8] Brown *v.* Mott, 7 Johns. (N. Y.) 361 (1811); Grant *v.* Ellicott, 7 Wend. (N. Y.) 227 (1831).

[9] Chester *v.* Dorr, 41 N. Y. 279 (1869).

courts had adopted the English rule upon the authority of the English cases and the two early New York cases since overruled. Some other American courts even after the overruling of these cases continued to cite them, apparently without being aware that they had been overruled. In one such case [10] the court also relied on and quoted from the decision of the lower court in Chester *v.* Dorr,[11] without noticing the fact that the Court of Appeals had reversed the lower court.

On the other hand, other jurisdictions in this country have repudiated the English rule and have held that an accommodation instrument negotiated for the first time after maturity cannot be enforced against the accommodating party even though the purchaser paid value for the instrument and without knowledge of its accommodation character.[12]

The American cases which refuse to adopt the English rule proceed upon the theory that when an accommodation instrument is given, it is the expectation and understanding of the parties that the accommodated party shall take care of it at maturity. It is submitted that this is the merchant's view of the case and that such view is entirely inconsistent with the idea that the instrument may be negotiated for the first time after maturity.

Again, the accommodating party should be entitled to pay his note according to its terms, that is, at maturity, in case it is not taken care of by the accommodated party, and he may be seriously injured by not having that opportunity. At the time of maturity, the accommodated party may have property on which the accommodating party can make an attachment or execution against the accommodated party, while at the time the note is negotiated or at the time when the accommodating party is called upon to pay it, it might be impossible to recover anything from the accommodated party.

The English rule involves the possibility that the instrument may be negotiated for the first time years after it has been signed, and after the accommodating party has wholly forgotten about it, for, not having received notice at its maturity, he would

[10] First Nat. Bank *v.* Grant, 71 Me. 374 (1880).

[11] *Sub nomine* Harrington *v.* Dorr, 3 Rob. (N. Y.) 275, 283 (1865).

[12] A collection of English and American cases can be found in the article by Professor Hening, 59 U. of P. Law Rev. 471, 486, n. 46–48.

naturally think, and would be entitled to think, that if negotiated, it had been taken care of by the accommodated party, or that it had never been negotiated. Yet, according to the English rule, he would be liable upon it, if it should be negotiated at any time within the statute of limitations (from six to fifteen years according to the jurisdiction) and suit be brought on it within that period. This would certainly be shocking to any business man.

When a man lends the use of his name to another by signing a bill or note payable at a certain time, it seems in accord with common sense to interpret the fixing of a definite time for payment as meaning an intention to limit the use of the name for the time mentioned in the instrument. This is true not only of the maker or acceptor but the conclusion is irresistible in the case of an accommodation drawer or indorser, for here the very terms of his contract are to pay if the instrument is presented at maturity to the party primarily liable and due notice of dishonor is given to the drawer or indorser. An accommodation drawer or indorser is entitled to the same diligence on the part of the holder as if the instrument had been drawn or indorsed for value; that is, he is entitled to have the instrument presented at maturity to the party primarily liable and due notice of its dishonor given to him.[13] To say that the drawer or indorser is liable upon an instrument negotiated for the first time after its maturity is absolutely inconsistent with the contract of the drawer or indorser because the instrument in such case is not and cannot be presented for payment at maturity.[14] If the English courts had had to face this question, they could hardly have argued as they did in the cases which established the English rule. In all those cases, the defendant was an accommodation acceptor, except one, and there he was acceptor of one instrument and maker of another.[15] The writer's view as to the understanding of business men has been confirmed by consultations with a number of bankers, who were unanimous in their opinions.

The Supreme Court of Wisconsin in a recent case[16] has held that under section 29[17] of the Negotiable Instruments Law an

[13] See 1 Am. & Eng. Encyc. Law and Practice, 526, note 23, for a large number of cases English and American in support of this proposition.

[14] Chester *v.* Dorr, 41 N. Y. 279 (1869).

[15] Parr *v.* Jewell, 16 C. B. 684 (1855).

[16] Marling *v.* Jones, 138 Wis. 82, 119 N. W. 931 (1909).

[17] Section 29. An accommodation holder is one who has signed an instrument as

indorsee who pays value for an accommodation note, with knowledge of the accommodation, may recover against the accommodating maker, even though the negotiation was the first one and was after maturity, and the learned author of an able article commenting on certain sections of the Negotiable Instruments Law [18] upholds the judgment of the Supreme Court of Wisconsin as to the construction of the statute.

This construction of section 29 is based chiefly on the contrast between the use of the phrase "holder for value" in section 29 with the phrase "holder in due course" used in section 28.[19] There is force in this argument, but it leads to absurd and unjust results, for the effect of it is to dispense with the necessity of the holder being a holder in due course in any respect except as to the giving of value. If the argument is sound, then the holder for value of accommodation paper occupies a position superior to that of any other purchaser of negotiable paper, since there is no other requirement for his recovery except that he be a holder for value. He will not be subject to any of the conditions prescribed by section 52 [20] except that he shall have given value for the instrument.

If the Supreme Court of Wisconsin is right, then any one who pays value for an accommodation instrument will be able to recover upon it even if the instrument was not complete and regular upon its face. It might have been obtained by fraudulent representations or by threats or undue influence. It might have been given upon an illegal consideration, *e. g.*, given to effect a violation

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maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to the holder for value notwithstanding such party, at the time of taking the instrument, knew him to be only an accommodation party.

[18] Professor Hening in 59 U. of P. Law Rev. 471, 532.

[19] Section 28. Absence or failure of consideration is a matter of defense as against any holder not a holder in due course; and partial failure of consideration is a defense *pro tanto*, whether the failure is an ascertained and liquidated amount or otherwise.

[20] Section 52. A holder in due course is a holder who has taken the instrument under the following conditions:

(1) That it is complete and regular upon its face;

(2) That he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact;

(3) That he took it in good faith and for value;

(4) That at the time it was negotiated to him, he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

of the liquor law or to furnish a house of prostitution or to aid in a burglary or a murder. It might have been signed in blank with an agreement that it should be filled up for a certain sum, and yet be filled up by or in the presence of the transferee for a larger sum.

In all these cases under the interpretation of the Wisconsin court, the purchaser for value, although cognizant of the conditions under which the paper was executed, is entitled to recover because he is a holder for value and need not be a holder in due course. Again, an agreement between the accommodated party and the accommodating party that the instrument should not be negotiated after maturity would be no bar to recovery even though such agreement was known to the purchaser after maturity. Even in the English cases [21] and all the American cases except one [22] which adopt the English rule, such an agreement would be an equity attaching to the instrument in case the first negotiation was after maturity, but if the transferee need not be a holder in due course, he would not be affected by this agreement provided only that he hold for value. If it was really intended to make an accommodation note fully negotiable after maturity so as to cut off the defense of the accommodation party, why was it provided in section 58, which is not in the Bills of Exchange Act, that

"In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable"?

This provision is so absolutely irreconcilable with the interpretation put on section 29 by the Wisconsin court as to justify the

[21] Charles *v.* Marsden, 1 Taunt. 224 (1808); Stein *v.* Yglesias, 3 Dowl. P. C. 252 (1834); Sturtevant *v.* Ford, 4 M. & G. 101 (1842); Parr *v.* Jewell, 16 C. B. 684 (1855).

[22] In Naef *v.* Potter, 226 Ill. 628, 80 N. E. 1084 (1907), a case upon an instrument made before the adoption of the Negotiable Instruments Law, the court without citing any cases on the point held that the transferee after maturity with knowledge of the fact of accommodation but without knowledge of the agreement not to negotiate the instrument after maturity could nevertheless recover against the accommodating party. It would now be otherwise in Illinois, since section 29, as adopted in Illinois, has an additional clause which restricts the transfer after maturity to cases where there is proof that "a transfer after maturity was intended by the accommodating party." But in other states which have not so changed section 29 before adopting the act such agreement would be no defense even if known to the person to whom the instrument is negotiated.

belief that the phrase "holder for value" was used in section 29 without full appreciation of the possible inference from such use.

It may be urged that the foregoing argument tends to show not that an amendment of section 29 is necessary, but merely that the construction of the section by the Wisconsin court is erroneous. But when not only a Supreme Court but also a learned teacher and writer interpret the section in the same way, is it not probable that other courts will follow their lead? It is submitted therefore that it is the part of wisdom to remove all doubt by an amendment which will prevent the possibility of a construction which produces a result so contrary to mercantile understanding, and which will lead to such mischievous consequences as have been above described.

Third. Section 40 [23] should be repealed. In the case of Smith *v.* Clarke [24] it was held that the *bonâ fide* holder of a bill indorsed in blank acquired the legal title by such indorsement in blank and that he might strike out the names of all intermediate indorsers, whether such indorsements were special or not, and hold the acceptor on the bill merely by proving the handwriting of the payee. The theory of the case was that the indorsement of the payee in blank made the bill payable to bearer and no subsequent holder could restrain its negotiability.[25]

The English Bills of Exchange Act did not adopt the rule of Smith *v.* Clarke but, on the contrary, abrogated it, for by section 8 (3) it provided that

"a bill is payable to bearer which is expressed to be so payable or *on which the only or last indorsement is in blank.*"

It is obvious that where the last indorsement on a bill or note payable to order is a special indorsement, the instrument is not payable to bearer, under this sub-section and that section 8 (3) of the Bills of Exchange Act altered the law. Judge Chalmers, the draftsman of the act, says that this sub-section

"was intended to bring the law into accordance with the mercantile understanding by making a special indorsement control a previous indorsement in blank."

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[23] Section 40. Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.

[24] 1 Esp. 180; s. c. Peake 225 (1794).

[25] Pollock, C. B., in Walker *v.* Macdonald, 2 Exch. 527, 532 (1848).

The Negotiable Instruments Law in section 9–5 [26] copies section 8 (3) of the Bills of Exchange Act with slight unimportant changes in phraseology, thus denying the principle of Smith *v.* Clarke. Yet section 40 reënacts Smith *v.* Clarke and was so understood by the draftsman, who cites Smith *v.* Clarke in support of the section.[27] The repugnancy of section 40 to section 9–5 was clearly pointed out by Professor Ames in his articles criticizing the Negotiable Instruments Law.[28] Judge Brewster made some unavailing attempts to uphold section 40.[29] Mr. McKeehan in his able review of the controversy between Professor Ames and Judge Brewster suggested [30] that sections 9–5 and 40 might be reconciled by limiting the operation of section 40 to instruments originally payable to bearer or subsequently made so by indorsement to bearer, and in support of that theory he said that Smith *v.* Clarke and all the cases following it involved instruments payable to order and indorsed in blank by the payee.

But it is submitted that the mercantile understanding that if an instrument payable to bearer is indorsed specially, the indorsement of the special indorser should be necessary for negotiation applies equally to instruments expressly payable to bearer and to instruments payable to order and indorsed in blank, and the opinion of bankers consulted by the writer and by his colleague Professor Williston was unanimous to this effect. And the convenience of the holder in being able to restrict negotiation by a special indorsement is as desirable in one case as in the other.

In the second place, it is not quite true that in all the cases following Smith *v.* Clarke the instrument was payable to order. In Johnson *v.* Mitchell [31] a note payable to "A. or bearer" was specially indorsed by A. to C. The plaintiff D. sued on it without an indorsement by C. and was allowed to recover without proof of any assignment by C. and Smith *v.* Clarke and other similar cases were cited and relied upon by the court. It is to be observed that Johnson *v.* Mitchell is also cited by Mr. Crawford under section 40.

[26] The instrument is made payable to bearer "1. When it is expressed to be so payable, or . . . 5. When the only or last indorsement is an indorsement in blank."

[27] Crawford, Negotiable Instruments Law, 3 ed., 55.

[28] Brannan, Negotiable Instruments Law, 2 ed., 169, 196, 297.

[29] Brannan, Negotiable Instruments Law, 2 ed., 185, 207.

[30] Brannan, Negotiable Instruments Law, 2 ed., 234–241.

[31] 50 Tex. 212 (1878).

It would seem clear that the inconsistency between section 9–5 and section 40 was overlooked when the act was drawn and adopted, and that section 40 should be repealed.

Fourth. Section 30 [32] should be amended so as to read

"An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery, *unless the only or last indorsement upon it is a special indorsement. In that case,* or if the instrument is payable to order it is negotiated by the indorsement of the holder completed by delivery."

This amendment is necessary in order to reach the result sought to be obtained by the repeal of section 40, and to bring the law into conformity with mercantile understanding and convenience by requiring the indorsement of a subsequent special indorsee to the negotiation of the instrument whether it be expressly payable to bearer or payable to order and indorsed in blank.

Fifth. Section 58 [33] should be amended so as to read as follows:

"Section 58. In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course and who is not himself a party to any fraud or illegality affecting the instrument *or had not previously been a holder with notice and subject to the defense of such fraud or illegality,* has all the rights of such holder in due course in respect of all parties *liable to the latter except intervening indorsers.*"

It is perfectly well settled that where the holder of a negotiable instrument has transferred it and subsequently re-acquired it, he is remitted to his old position just as if everything which had taken place since his transfer had been wiped out. In consequence of this rule, it follows that when such former holder was subject to any defense in favor of parties prior to himself, he cannot better

[32] Section 30. An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery.

[33] Section 58. In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.

his position by transferring the instrument and re-acquiring it from a holder in due course. Otherwise he would be able to take advantage of his own wrong in transferring the instrument. There are numerous cases, and so far as has been ascertained, no dissent from the position that the payee of an instrument which he has procured by fraud or upon an illegal consideration, cannot claim any rights under a re-acquirement of it from a holder in due course.[34]

The same principle applies with equal force to a holder who is not the payee but took the instrument with notice or knowledge of the fraud or illegality. He has no right to recover upon the instrument; in fact, he is a constructive trustee for the defrauded party. If he transfers the instrument to a holder in due course, who could enforce it against the defrauded party, he is doing a wrong and it would be preposterous to permit him to take advantage of his own wrong by subsequently getting the instrument back from the holder in due course.

This proposition is supported by all the authorities directly in point which have been found.[35] It is the same principle which governs in like transfers of real estate.

"If the title to land, having passed through successive grantees, and subject in the hands of each to prior outstanding equities, comes to a purchaser for value and without notice, it is at once freed from these equities; he obtains a valid title, and, with a single exception, the full power of disposition. This exception is, that such a title cannot be conveyed, free from the prior equities, back to a former owner who was charged with notice. If A., holding a title affected with notice, conveys to B., a *bonâ fide* purchaser, and afterwards takes a reconveyance to himself, all the equities revive and attach to the land in his hands, since the doctrine requires not only valuable consideration and absence of notice, but also good faith." [36]

A recent case in the New York Appellate Division,[37] however, contains a *dictum* to the effect that only the payee of a note subject to the defense of fraud or illegality is debarred from sheltering

[34] 7 Cyc. 940, note 28, with many cases.

[35] Dollarhide *v.* Hopkins, 72 Ill. App. 509 (1897); Feland *v.* Stirman, 15 Ky. L. Rep. 271 (1893); Cline *v.* Templeton, 78 Ky. 550 (1880); Coyne *v.* Anderson, 73 S. W. 753 (Ky.), *semble*; Devlin *v.* Brady, 36 N. Y. 531 (1867).

[36] 2 Pomeroy, Equity Jurisprudence, sec. 754. See also Trentman *v.* Eldridge, 98 Ind. 525 (1884).

[37] Horan *v.* Mason, 141 N. Y. App. Div. 89, 125 N. Y. Supp. 668 (1910).

himself behind the rights of a holder in due course, from whom he had re-acquired it, after his previous transfer of it, but that a subsequent holder although taking with notice of the fraud or illegality could transfer the instrument, re-acquire it from a holder in due course and recover against parties prior to himself. The court cites in support of this proposition only two cases. In the first of these cases [38] the defense was not fraud or illegality but merely want of consideration, and in addition, the plaintiff had not been a holder of the instrument, and therefore could not be remitted to a position which he never had; and moreover knowledge of want of consideration is no defense whatever against one who paid value for the instrument.

In the other case relied upon by the Appellate Division [39] the plaintiff although an indorser, had never been a holder of the note and therefore was not in the position of having transferred a note which was subject to equities in his hands. Secondly, the defense was not fraud or illegality, but a counter-claim the nature of which did not appear. Finally, there was no claim that plaintiff had, at any time, notice or knowledge of the facts on which the counter-claim was based. It is submitted that neither of these cases supports the *dictum* in Horan *v.* Mason.

But the court in Horan *v.* Mason also construed section 58 [40] of the Negotiable Instruments Law as not prohibiting a former holder with notice of fraud or illegality from recovering on the title of a holder in due course, from whom such former holder had re-acquired the instrument by paying it at maturity.

It is difficult to see why this construction of section 58 is not correct, since the plaintiff in the case supposed was not "himself a party to any fraud or illegality affecting the instrument." Possibly it might be argued that by transferring an instrument which he had taken with notice of a previous fraud or illegality which then affected it, he might thereby make himself a party to such fraud or illegality, but this is, to say the least, doubtful.

It may, however, be claimed that section 121 [41] of the Negotiable

[38] Benedict *v.* De Groot, 1 Abb. Dec. (N. Y.) 125 (1867).

[39] Flint *v.* Schomberg, 1 Hilton 532 (1858).

[40] N. Y. Consol. Laws, c. 38 (Laws of 1909, c. 43), § 97.

[41] N. Y. Consol. Laws, c. 38 (Laws of 1909, c. 43), § 202. Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may

Instruments Law is sufficient to prevent a purchaser with notice of fraud or illegality from bettering his position by a transfer to a holder in due course and a subsequent re-transfer to himself and that the *dictum* of the Appellate Division was due to its failure to consider section 121. A Massachusetts case [42] gives support to this view. It was there held that payment by an anomalous indorser extinguishes a note and that neither he nor his transferee can recover on the note because an anomalous indorser, although secondarily liable on the note, had no former rights on it against any party. His remedy against the maker whom he was backing would be outside the instrument.

There is this difference between the two cases. The anomalous indorser had never been a holder; he had never had title to the instrument and therefore could not have sued prior parties on it. In the case under discussion, the plaintiff had been a holder, he had held the title and therefore had had a legal right to sue prior parties, but he was subject to the equitable defense of fraud or illegality. But section 121 seems to cover both cases and to subject a party secondarily liable who pays the instrument to the same defenses which were good against him before his transfer, whether such defenses are legal or equitable.

There is, however, a case to which section 121 would clearly not apply. If the instrument is payable to bearer (whether originally so drawn or because indorsed in blank) and the holder transfers it by delivery, or if it is payable to his order and he indorses it without recourse and then subsequently re-acquires it from a holder in due course, he could recover on it even though when he first took the instrument he had notice of fraud or illegality affecting it. He does not come within section 121 and would not be remitted to his original position because he was not secondarily liable on the instrument.

And there is still another case in which section 121 does not cure the defect in section 58. Section 121 applies only when the instrument is *paid* by a party secondarily liable. If the instrument is re-

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strike out his own and all subsequent indorsements, and again negotiate the instrument, except: 1. Where it is payable to the order of a third person, and has been paid by the drawer; and 2. Where it was made or accepted for accommodation, and has been paid by the party accommodated.

[42] Quimby *v.* Varnum, 190 Mass. 211, 76 N. E. 671 (1906).

acquired *before maturity*, it is not paid, and therefore section 121 would not prevent a party who took it with notice of fraud or illegality from acquiring a title free from such defenses by transferring the instrument to a holder in due course and taking a re-transfer before maturity. It is therefore necessary to amend section 58 to meet these two cases as well as to remove all doubt as to the other cases.

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[*To be continued.*]